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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 1084

KRAFT CHEESE COMPANY,

Petitioner,

against

CONWAY P. COE, COMMISSIONER OF PATENTS,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI.

TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA.

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INDEX TO SUBJECT MATTER.

	PAGE
Petition for a Writ of Certiorari.....	1 to 5 incl.
Statement of the Matter Involved.....	2
Jurisdiction	3
The Question Presented.....	3-4
Reasons Relied On for Allowance of the Writ....	4-5
Brief in Support of Petition.....	6 to 19 incl.
The Facts.....	6 to 8 incl.
Argument	9 to 18 incl.
Proposition No. 1. The Intent of the Trade-Mark Act of 1905 was to afford the fullest possible protection of the property rights of the owner of a common law trade-mark used in Federal commerce.....	9 to 11 incl.
Proposition No. 2. Exceptions and provisos of a statutory grant expressed in general terms, require the strictest interpretation, and all doubts should be resolved in favor of the one who qualifies under such general grant	11-12
Proposition No. 3. The composite mark "Old English" is neither descriptive nor geographical. It is not in the public domain.....	12-13
Proposition No. 4. The phrase "Old English" has a recognized dictionary meaning, which is not applicable to cheese, and therefore is purely fanciful.....	13-14
Proposition No. 5. Under the authorities, "Old English" is a legitimate common law trade-mark for cheese.....	14 to 16 incl.
"The American Girl".....	14-15
"Old South".....	15
"Old German".....	16
Proposition No. 6. The Court of Appeals has failed to draw a proper line of distinction between composite words which are registrable, and those which are disqualified for registration	16 to 18 incl.
Conclusion	18-19

INDEX OF CASES.

- American Foundries v. Robertson, 269 U. S. 372, 381.. 5, 9
 Baldwin Company v. Robertson, Commissioner of Pat-
 ents, et al., 265 U. S. 168..... 3
 Beckwith v. Commissioner of Patents, 252 U. S. 538
 4, 5, 10, 16
 Gerhard Lang Brewery v. Phoenix Brewing Corpora-
 tion, N. Y., 29 T. M. Rep. 439, 444..... 16
 Hamilton Brown Shoe Company v. The Wolf Bros. &
 Company, 240 U. S. 251, 256..... 5, 14, 15
 Hanover Milling Co. v. Metcalf, 240 U. S. 403, 412.... 9
 Southeastern Brewing Co. v. Blackwell, 80 Fed. (2d)
 607, 609 (C. C. A. 4)..... 15
 U. S. v. Dickson (40 U. S.), 15 Peters 141, 165..... 4, 11, 12

STATUTES.

- Sec. 1 of the 1905 Act (15 U. S. C. 81)..... 10
 Sec. 5 of the Trade-Mark Act of 1905 (15 U. S. C. 85)
 2, 3, 10, 11 & fly-leaf

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No.

KRAFT CHEESE COMPANY,

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PETITION FOR A WRIT OF CERTIORARI.

TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioner, Kraft Cheese Company, respectfully petitions
this Court to issue a writ of certiorari to review a judgment
of the United States Circuit Court of Appeals for the
District of Columbia finally entered on January 4, 1945.

STATEMENT OF THE MATTER INVOLVED.

On June 6, 1940, the Petitioner, Kraft Cheese Company, filed its application Serial No. 432,724 in the United States Patent Office, under the Act of 1905,¹ for registration of the mark "OLD ENGLISH" (written in "Old English" type), which trade-mark Petitioner and its predecessors have been using upon cheese since about the year 1912. The application was rejected by the Examiner, which rejection was affirmed by the Commissioner of Patents, and, thereafter Petitioner filed suit in the District Court of the District of Columbia in order to overcome the Commissioner's refusal to register the mark.

The District Court denied relief, and the Petitioner appealed to the United States Court of Appeals for the District of Columbia, which affirmed the District Court, holding that (a) the word "English" was geographical and (b) the word "old" was descriptive, and that the mark was on that account unregistrable, citing a part of Section 5 of the 1905 Act (15 U. S. C. 85), which part provides:

"That no mark which consists * * * merely in words or devices which are descriptive of the goods with which they are used * * * or merely a geographical name or term, shall be registered under the terms of this [Act]. * * *"

The full text of the relevant part of Section 5 of the act is printed on the fly-leaf at the end of this brief.

1. Act of February 20, 1905, Statutes at Large, Chapter 592, Sections 10-30 inclusive, 33 Statute, pages 724 to 731 inclusive (U. S. C. Title 15, Sections 81-108 inclusive).

JURISDICTION.

The suit in the District Court was brought under the provisions of Section 9 of the Trade-Mark Act, February 20, 1905 (15 U. S. C. 89) and Sec. 4915 of the Revised Statutes (15 U. S. C. 35) as interpreted by the Supreme Court of the United States in the case of *Baldwin Company v. Robertson, Commissioner of Patents, et al.*, 265 U. S. 168.

From the decision of the District Court, appeal was taken under Sec. 128 of the Judicial Code (U. S. C. Title 28, Sec. 225). The Court of Appeals, D. C., affirmed the decision of the District Court on December 18, 1944. A petition for rehearing was filed on January 2, 1945, and denied on January 4, 1945.

THE QUESTION PRESENTED.

In this case, Petitioner has shown by uncontradicted evidence that the mark **in its entirety** (a) serves to distinguish its goods from the goods of others; (b) does not describe any properties or characteristics of the goods; (c) has no geographical meaning.

The mark thus satisfies the requirements of the general language of Section 5, the first part of which reads as follows:

“That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trademark on account of the nature of such mark, unless such mark,” etc.

The **question** is whether the Commissioner of Patents may refuse to register a composite two-word trade-mark, which, **in its entirety** is fanciful and legitimate at common law, merely because each word would be separately unregistrable?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The question involved is of general importance, since it involves the registrability of large numbers of valuable composite fanciful marks, the elements of which are separately unregistrable.

2. The above question is of substance, it involves an interpretation of Sec. 5 of the 1905 Act, and has not been, but should be settled by this court.

3. The Court of Appeals, by improperly enlarging the scope of the provisos in Sec. 5 of the 1905 Act, has not given proper effect to the rule laid down by this Court in *U. S. v. Dickson* (40 U. S.), 15 Peters 141, 165, which directed that provisos of this character should be strictly construed; and has not given proper effect to the directions of this Court in the case of *Beckwith v. Commissioner of Patents*, 252 U. S. 538, expressed in the following language:

(Page 544)

"It must be noted that the requirement of the statute that no trade-mark shall be refused registration except in designated cases is just as imperative as the prohibition of the proviso against registration in cases specified."

(Page 545)

"refusal to register a mark * * * deprives him of the benefits of the statute, and this should not be done, if

it can be avoided by fair, even liberal construction, of the Act, designed as it is to promote the domestic and foreign trade of our country."

(Page 545)

"The commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail. For this reason, it should be considered **in its entirety * * *.**"

4. In deciding that the phrase "OLD ENGLISH" is unregistrable, on the theory that it is not a good technical trade-mark for cheese, the Court of Appeals has not given proper effect to the decisions of this Court in *American Foundries v. Robertson*, 269 U. S. 372, 381, which held that the purpose of the 1905 Act was to permit registration of all "**legitimate common law trade-marks**", and in *Hamilton Brown Shoe Company v. The Wolf Bros. & Company*, 240 U. S. 251, 256, wherein it was held that the mark "**THE AMERICAN GIRL**", for ladies' shoes, was not descriptive and was not geographical, but was fanciful, and therefore a legitimate trade-mark.